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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALFRED J. PRITCHARD, *Appellant,* vs. GEORGE K. McLEOD, FAIRHAVEN WATER COMPANY, a corporation, JOHN DOE and RICHARD ROE, *Appellees.*	No. 2206.

Brief of Appellees

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The only question raised by this appeal is, Does the complaint in this suit state a cause of action for the specific performance of the contract sued on? The court below held that it did not. A sufficient statement of the case is to refer to the transcript for a copy of the complaint (Tr. pp. 1-8).

The counsel for appellant contends that the contract sued on is an absolute bilateral contract of sale and cannot in any sense be termed an option. The appellees have no quarrel with the definition of an option given by the authorities cited by appellant

on page 9 of his brief, but respectfully submit that the definition is worded to embrace the cases under consideration and is not exhaustive enough to embrace all optional contracts. The definition there given is that an option "is simply a contract by which the owner of property agrees with another person that he shall have the right to buy the property at a fixed price within a certain time" (Appellant's Brief p. 9). But an option may also be a right to purchase certain property at an indefinite time, but under certain conditions, as in the case at bar. In the contract in suit the appellee agrees to buy certain property for $30,000 *"upon the following terms and conditions,"* one of which is a part of the purchase price, $25,000, is to be paid as follows (quoting from the contract):

"4. Twenty-five per cent. of the gross output of gold taken from any of the claims sold by the party of the first part to the aforesaid party of the second part, to be paid over upon demand to said party of the first part, until the sum of twenty-five thousand dollars ($25,000) is paid in full."

Such a contract has been held to be only an option.

Smith vs. Jones, 60 Pac. 1104 (Utah).

The real question, however, is not whether the contract in suit may or may not be what is technically called an option, but whether it created any

obligation on the appellee to pay the $25,000 from any other source than from 25 per cent. of the gross output of the claims. This question should be answered in the negative.

> 9 *Cyc.* 616, and cases there cited.
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> *Barron vs. Trust Co.*, 68 N. E. 831 (Mass.).
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> *Rogers Ruger Co. vs. McCord*, 91 N. W. 685 (Wis.).
>
> *Lorillard vs. Silver,* 36 N. Y. 578.
>
> *Gardner vs. Edwards,* 26 S. E. 155 (N. C.).
>
> *Bagley vs. Cohen*, 50 Pac. 4 (Cal.).
>
> *Orman vs. Ryan*, 55 Pac. 168 (Colo.).
>
> *Great Western Oil Co. vs. Carpenter*, 95 S. W. 57.

The case of *Ray vs. Hodge*, 13 Pac. 599 (Or.), cited by appellant on page 14 of his brief, is also directly in point.

There is no clause in the agreement binding appellee to mine the property. Appellant claims such a covenant must be implied, and cites to support this contention *Ray vs. Hodge*, 13 Pac. 599 (Or.); *Toombs vs. Mining Co.*, 15 Nev. 444, and *Oliphant vs. Woodburn Coal & Min. Co.*, 63 Ia. 332. These cases are easily distinguished from the case at bar. In *Ray vs. Hodge, supra,* the case is thus stated in the syllabus:

"A agreed to and did assign to B a half interest in a lease of a gold and quicksilver mine for '$750

cash, and $1,200 when 250 flasks of quicksilver should be produced.' *Held,* that in the absence of a showing that 250 flasks of quicksilver had been produced A could not recover from B the amount stipulated without proving that B had failed to make reasonable efforts to operate the mine in view of the outlay attending it and the prospects of its development."

It will be found upon examining the opinion that the lease in *Ray vs. Hodge* required the lessee in express terms to work the mine, and such agreement was not left to be implied.

In delivering the opinion the court in *Ray vs. Hodge say* (13 Pac. 601):

"But the court is unable to agree with the respondent's counsel that Hodge obligated himself by taking the assignment of the half interest in the lease to extract from the mine 250 flasks of quicksilver. He did not agree to prosecute the work any longer than it could successfully be operated. The tacit understanding that the mine would prove a success was a part of the implied understanding that he would work it. The undertaking was evidently an experiment. Hodge was willing to pay the respondents $1,500 cash and $2,500 more when the 250 flasks of quicksilver were produced; but he did not agree expressly or by implication that he would produce that quantity of quicksilver or prosecute the enterprise any longer than a prudent man would be justified in continuing it."

In the case at bar no allegation is made in the complaint that the claims could be worked at a profit, or that they or any of them contained any gold whatever, but the allegation simply is that

appellee "neglected to mine said premises or to extract gold therefrom, whereby and on account of which all of said moneys are now due and payable."

For appellant to prevail under the case of *Ray vs. Hodge*, viewed under the most favorable aspect for appellant, it would be necessary for the contract in the case at bar to have contained an express agreement to work the claims, and it would further be necessary for appellant to have alleged in his complaint that by such work appellee could have extracted at a profit therefrom $100,000 gross in gold. And even if we concede that an agreement to work if profitable could be impliedly read into the contract, an allegation in plaintiff's complaint that the claims or some of them could have been profitably worked and would have produced $100,000 gross would still be necessary.

The Nevada and Iowa cases above referred to cited by appellant are distinguishable upon similar grounds as *Ray vs. Hodge*.

In the court below the plaintiff's counsel relied on the case of *Noland vs. Bull*, 33 Pac. 983, 24 Ore. 479, and it is from this case that it was argued that the $25,000 became due absolutely in a "reasonable time" whether any gold was taken from the claims or not. But when properly considered, the case of *Noland vs. Bull* and all the authorities cited therein are favorable to appellee.

The court in *Noland vs. Bull* distinguished between a contract creating a conditional liability, such as in the case at bar, and a contract entered into a pay a present, conceded and admitted debt already due at "an uncertain future date when a certain specified transaction shall be accomplished." In the latter case the debt becomes due in a reasonable time, but in the former the liability itself is conditional.

This was the view taken by the judge of the court below in the case at bar. The reason why no opinion appears in the record, as referred to in the brief of counsel for appellant, is because it was only an informal oral opinion.

Contracts such as the one forming the basis of the suit at bar are very common in Alaska and other mining localities, and are usually spoken of in common parlance as contracts of sale payable on "bedrock." That they create any personal liability to pay except upon production of the gold from the ground is a novel and startling doctrine which it is not believed the court will sanction.

It is respectfully submitted that the judgment should be affirmed.

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Attorney for Appellees.